the very basis of the requirements of natural justice and is serious enough to warrant a finding by this court that it is sufficient to invalidate the decision of the head teacher. For these reasons, I hold that the claim must succeed.

Having thus decided, I do not propose to consider the effect of the proceedings before, and the decision of, the Board of Governors.

As regards the claim for damages, I am not satisfied that the plaintiff has succeeded in proving the defendants' liability. The 1st defendant's omission to provide adequate notice in the circumstances mentioned above does not legally entitle the plaintiff to claim damages unless it is shown that the 1st defendant acted dishonestly, maliciously or in bad faith. I have, however, found that in the circumstances of this case the 1st defendant acted honestly and *bona fide*.

I therefore enter judgment for the plaintiff and declare that the order of expulsion of the plaintiff as a pupil from the King George V School, Seremban, made by the 1st defendant with effect from the 4th day of May, 1968, is null and void and is of no effect. I also order that the plaintiff be reinstated as a pupil of the King George V School, Seremban, and costs.

Order accordingly.

Solicitors: *Nadchatiram Bros.*

WONG KHANG JONG v. ALI & ANOR.

[F.C. (Ong Hock Thye C.J. (Malaya), Gill & Ali F.JJ.) September 10, 1969]

[Kuala Lumpur — Federal Court Civil Appeal No. X. 12 of 1969]

Negligence — Personal injury — Damages — Quantum.

Damages — Leg — 2" shortening.

Damages — Award — Error in principle — Levelling factor.

In this case the appellant had been injured in a road accident caused by the negligence of the first respondent. He was formerly a cook and at the time of the accident was 52 years old. As a result of the accident he sustained a fracture of the right femur resulting in a 2" shortening of the leg, limitation of flexion of the knee, limited rotation and extension of hip movement and some wasting of the muscle of the right calf and leg. He was awarded $5,500 for pain and suffering and $2,000 for loss of future earnings. By way of contrast the learned trial judge in a subsequent case in the same month awarded a married woman aged 69 at the date of the accident $7,500 general damages for fracture of the right femur causing a 2½" shortening of the leg, limitation of flexion of the right knee joint and wasting of leg muscles.

Held, allowing the appeal: there was an error of principle in awarding identical awards to two persons where expectation of life must be different by some 10 years, on the ground that the levelling factor was the expectation of the appellant in this case of working life as a cook and therefore the award of damages must be increased from $7,500 to $10,000.

Cases referred to:—

(1) *Sah Imm* v. *Utam Singh Omnibus Co. Ltd.* (unreported).

(2) *Watson* v. *Powles* [1967] 3 All E.R. 721, 723.

(3) *Jag Singh* v. *Toong Fong Omnibus Co. Ltd.* [1964] M.L.J. 463, 465.

(4) *Fletcher* v. *Autocar & Transporters Ltd.* [1968] 1 All E.R. 726, 736.

FEDERAL COURT

D.H. Murphy (*David S.H. Tay* with him) for the appellant.

M. Edgar for the respondents.

Cur. Adv. Vult.

Ong Hock Thye C.J. (Malaya): On October 25, 1965 the appellant was riding a motor-cycle from Port Dickson to Kuala Lumpur when he collided with the respondents' omnibus, the driver of which was held negligent and solely responsible. The judge awarded the appellant $4,380.40 and $7,500 respectively for special and general damages. This appeal is on the ground that the quantum of general damages is too low.

The appellant formerly used to work in canteens and coffee-shops. Later he had his own coffee-shop, but went out of business to work as cook to a European family who also employed his wife. He was earning $165 per month when he was injured. He was then 52 years old. When the action came on for trial he was 56.

The injury he sustained was a comminuted fracture of the upper one-third of the right femur, resulting in a permanent limp, due to a 2-inch shortening of the leg, 30-degree flexion limitation of the knee, limited rotation and extension of hip movement and some wasting of the muscles of the right calf and leg. He was admitted into hospital for 1½ months, after which he continued treatment as an outpatient till readmission on November 14, 1966 into hospital, from which he was finally discharged on January 21, 1967. He had to use crutches in 1967, but could dispense with them since. He can now stand and walk for half an hour, beyond which he would feel pain. As to his capacity to work the State Surgeon testified that his disabilities would not interfere with or affect his job as a cook.

Regarding the question of damages, it may be observed that the appellant's pre-trial loss of earnings had been included in the award for special damages, at the rate of $165 per month for the 15 months between his first admission into hospital and his final discharge on January 21, 1967, amounting to $2,475. Thereafter he

was awarded a further $1,380 for 23 months at the rate of $60 per month, as compensation for partial disablement.

In respect of general damages, the sum of $7,500 was split under two main heads: $5,500 for pain and suffering and $2,000 for loss of future earnings. Judgment herein was given on January 2, 1969. By way of contrast, in an unreported case, *Sah Imm v. Utam Singh Omnibus Co. Ltd.*,[1] decided by the same judge on January 30, 1969, a married woman, 69 years old at the date of the accident, had been awarded $7,500 general damages for a fracture of the right femur causing a 2½ inch shortening of the right leg, limitation of flexion of the right knee joint and wasting of the leg muscles.

The test which an appellate court has to apply in cases of appeal against quantum is that which Winn L.J. has expressed in vivid and meaningful language: "Good gracious me, is this clearly wrong?": see *Watson v. Powles.*[2] In more prosaic terms: "Is this a wholly erroneous estimate?" We have been referred by counsel on both sides to a number of awards in various courts, but, as the Privy Council judgment in *Jag Singh v. Toong Fong Omnibus Co. Ltd.*[3] emphasised:—

> "Caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in the main essentials the facts in one case bear comparison with the facts of another before any comparison between the awards in the respective cases can fairly or profitably be made."

Nevertheless, the two awards by the same judge in one month invite comparison. For the old woman of 69 there was no loss of future earnings. In the case of the appellant who is 56, the evidence shows that his earning capacity as a cook remains unaffected, but the learned judge allowed $2,000 on the basis that "given only two or three years expectation of working life I thought it reasonable to award for loss of earnings at the rate of $60 per month based on three years expectation of working life. In doing so, I have taken into account future contingencies, e.g. the uncertainty of employment and the improbability of a steady income". On this point of comparison, I have found valuable guidance in the judgment of Diplock L.J. who said in *Fletcher v. Autocar & Transporters, Ltd.*[4]:—

> "I think that the result of the decisions in these cases is that the standard of comparison which the law applies, if it is not wholly instinctive and incommunicable, is based, apart from pain and suffering, on the degree of deprivation — that is, the extent to which the victim is unable to do those things which, but for the injury, he would have been able to do."

Since this appellant suffered no deprivation as a result of impairment of his earning capacity in his chosen occupation, it seems to me quite fair to aggregate the two items of general damages, which he was awarded, for purposes of comparison with the award of a similar sum of $7,500 to the woman who was 13 years older. The award to the woman was on the high side, in the view of this court, and should not be regarded as a norm. There was probably little difference in the extent of pain and suffering endured in both cases. Yet two persons were given identical awards whose expectation of life must be different by some 10 years (a woman lives longer, according to actuarial tables), on the ground that the levelling factor was his expectation of a *working life*. With respect, I think herein lies the error, which was an error of principle. In point of fact, a cook is no less fit for work at 70 than at 60 — if he lives that long. For this reason I would allow the appeal and increase the award of general damages from $7,500 to $10,000, having regard to loss of amenities and physical disablement for the rest of his life.

Gill and Ali F.JJ. concurred.

Appeal allowed.

Solicitors: *Murphy & Dunbar; Morris Edgar & Co.*

YEW YOU & ANOR. v. MAH POAY KOH & ANOR.

[F.C. (Ong Hock Thye C.J. (Malaya), Gill & Ali F.JJ.) September 10, 1969]

[Ipoh — Federal Court Civil Appeal No. X.17 of 1969]

Negligence — Claim for damages — Case decided on onus — Onus on plaintiffs of proving negligence — Balance of probabilities.

In this case the learned trial judge had dismissed the claim of the appellants for damages under sections 7 and 8 of the Civil Law Ordinance, 1956, arising from a collision between a motor-cycle and a lorry as a result of which the motor-cyclist was killed. The trial judge held that the appellants had failed to discharge the onus of proving the lorry driver's negligence.

Held, allowing the appeal: (1) the question of onus only becomes relevant when the evidence on both sides is so evenly balanced that the question becomes relevant to turn the scales in favour of one or the other;

(2) in this case the circumstances of the case showed that the lorry driver was negligent and also negatived contributory negligence on the part of the motor-cyclist and therefore the appeal must be allowed and judgment given for the appellants.

Case referred to:—

(1) *Lim Soh Meng* v. *Krishnan* [1967] 1 M.L.J. 8.

FEDERAL COURT

A. Mahendran for the appellants.

P.P. Dharmananda for the respondents.